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ABSTRACT

The circumstances under which certificated employees, including instructors, counselors, librarians, school nurses, and administrators, may be laid off are governed by Section 87743 of the California Education Code of 1976. The statute provides that when a school district is faced with financial exigency, layoffs may be made if they conform to the requirements of the Code, i.e., if there is an enrollment decline or a reduction or discontinuance of specific services or programs. The Code also specifies the conditions which must be complied with to reduce staff: (1) layoffs must occur at the end of the school year; (2) notice of termination must be given on or before May 15; (3) the right to a hearing must be provided, and these hearings, if requested, must be conducted in accordance with the Code; and (4) at a time of reductions in force, administrators may be transferred to teaching positions in those disciplines in which they are certificated, competent, and senior to other instructors in the discipline. After explaining the Code's provisions, this report presents two case studies involving layoffs. The first concerns the passage of the "Jarvis-Gann" Tax Limitation Initiative of 1978. It discusses the legal process which ensued after 52 employees were terminated and the legal and policy implications of the reduction in force. The second deals with Hopper vs. Yosemite Community College District, a recent decision involving the termination of an Assistant Dean. (HB)

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Management Report

1981-2/1

"Reduction in Force: Applicable Law and Related Case Studies"

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JC 820 005

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REDUCTION IN FORCE: APPLICABLE LAW AND RELATED CASE STUDIES

BY

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REDUCTION IN FORCE

INTRODUCTION

The decision to implement a Reduction in Force (RIF) can create greater trauma in a community college district than any other single decision of which I am aware. The ramifications, whether one person be involved or a dozen, will have an impact on the total staff as well as the classroom. Moreover, such a decision can establish a legal basis for the actions taken by other community college districts. Nonetheless, this is a decision that some have had to make in the past few years and others expect to face this year and next.

In the report that follows, Griffin McKay takes from his dissertations an overview of the process and then cites two cases involving layoffs. For those who are unfamiliar with the machinations of the law, they will find the material enlightening, perhaps even surprising. For those who have been involved in the process, the report will serve as a reminder as well as an update. Obviously any who contemplate such actions should seek legal counsel. This report is intended as an introduction from a fellow educator for the edification of members of the management team.

Frank C. Pearce, Superintendent
West Valley Community College District

California Statutory Law

Reductions in Force

Certificated staff members, for purposes of this investigation, include instructors, counselors, librarians, school nurses, and administrators employed by any California public community college. Layoffs or reductions in force of these employees are governed by Section 87743 of the California Education Code as enacted in 1976. This statute provides that when a school district is faced with financial exigency, layoffs may be made if they conform to Code requirements.

Financial exigency may occur in one or more ways. Section 87743, however, provides two conditions for reductions in force: (1) enrollment decline and (2) reduction or discontinuance of specific services and programs. Neither of these conditions, however, takes into consideration the situation when the district does not have sufficient funds to pay salaries. In fact, Section 87433 prohibits discharge or deprivation of the classification as a regular employee for that reason. One Code-approved condition is when the average daily attendance in all of the schools for a district has declined. The measure used is that of comparing the average daily attendance of the first six months in which the school is in session with the corresponding period of either of the two previous years.

The second condition found in the Code which allows reductions in force is when a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year. An example would be the elimination of the teaching of a particular foreign language. This would result in the layoff of the instructors in this discipline unless they were certificated to teach in another subject matter and had more seniority

than other instructors in that discipline.

Beyond enrollment decline and the reduction or discontinuance of specific services or programs, there are other important restrictions in Section 87743. For example, layoffs must occur at the end of the school year, whether such terminations involve regular (tenured) staff or contract (nontenured) employees. However, no regular employee in a given discipline or subject area may be laid off while a probationary or an instructor with less seniority is retained in that discipline.

An employee may have credentials to teach in more than one discipline. If a reduction of service occurs in one, then the teacher may "bump" into another discipline and be retained to render a service in which the employee has the requisite seniority, is certificated, and is competent to render such service.

Notice of Termination

According to the California Education Code Section 87743, notice of termination of services, either for a reduction in enrollment or discontinuance of a particular kind of service to take effect the following school year, must be given on or before May 15. Moreover, preliminary notice that an employee's services will not be needed for the following year is required by March 15 in another provision in the Code, Section 87740. In brief, if notice is not given by the May 15 to a regular or contract employee, or if the employee has not been given the right to a hearing as provided for in Section 87740, the employee is deemed reemployed for the following school year.

Lastly, Section 87740 provides that the governing board may make assignments in such a manner that employees shall be retained to render service which their credential, seniority, and qualifications entitle them to render. Yet, although the preceding provision seems on its face to be simple and unambiguous, there are some complications which belie its prima facie simplicity. In the case of regular employees, for example, Section 87543 provides that they may not be dismissed without their consent or deprived of their classification as a regular employee when the district bases its termination rationale solely on the ground that it is without sufficient funds to pay the salaries.

When financial exigency necessitates an overall reduction in forces, college seniority and tenure in the various disciplines become prime determinants as to whom will be terminated. The initial administrative scrutiny is of the contract or nontenured staff. Section 87608 of the California Education Code provides that an employee teaching under a first-year contract may not be reemployed for a second year if notice of intention not to reemploy is given by March 15. Section 87609, governing continued employment of employees teaching under a second consecutive contract, differs from the preceding section since it relates to rights of tenure if not given notice of the intent to terminate employment by March 15 of the academic year covered by the existing contract. In addition, the second-year contract employee may appeal the decision to the governing board. If a hearing is requested, then it must be conducted and the proposed decision must be prepared in accordance with Section 87740.

Hearing

The notice of intent not to reemploy is sent in writing by the superintendent which notifies the employee that there is a right to a hearing. The employee then may submit a written request to the superintendent for a hearing to determine if there is cause for non-reemployment. There are several technical time provisions within Section 87740, however, governing both the timing of the notice of right of hearing and the return of the request for the hearing.

In the event a hearing is requested, it must be conducted in accordance with the California Government Code and is conducted by a hearing officer who prepares a proposed decision. The proposed decision contains findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the school and the students. It contains a determination as to the sufficiency of the cause and a recommendation to the governing board. The most salient point of law within this section, however, is that the governing board makes the final determination as to the sufficiency of cause and disposition. None of the proposed decisions is binding on the governing board or on any court in future litigation. The expenses of the hearing are paid by the governing board, and the decision becomes effective on May 15 of the year the proceeding is commenced.

Administrator/Supervisor Transfers

Though it has been well established that a person in an administrative or supervisory position has no tenure rights to that position, nevertheless, Section 87457 requires a written statement of the reasons for transfer to a teaching position. This section is important because at a time of reductions in force, administrators are also "riffed," but many return to

teaching in those disciplines in which they are certificated, competent, and senior to other instructors in the discipline.

Normally, there is no problem with the test of competency when an administrator is reassigned to teaching, but there may be if the academic training is inadequate or the training and experience is such that the employee is no longer current.

Just as with other certificated employees, notice of reassignment must be given by March 15. Section 87741 provides that if such notice is not given by that date, the administrator enjoys the same rate of pay for the ensuing year, though reassignment may occur.

Case Study: Glendale Community College

All the information for this case study was obtained from the documents used in the reductions in force process at Glendale Community College in early 1978. These documents include recommendations made by the administration to the Glendale Community College Board of Education in open board meetings, minutes of board meetings, and the communications developed and delivered to affected faculty at various times during the termination actions. The case study was reviewed by Los Angeles County Counsel for legality and accuracy.

A Case Study

During 1977 and early 1978, petitions were circulated to secure sufficient signatures to place a Property Tax Limitation Initiative on the ballot for June, 1978. Far more signatures were obtained than the minimum required to place the measure on the ballot. Emerging concern began to echo within

the halls of state and local government agencies, including education, of the negative financial consequences if the initiative received approval by the electorate. One of the many governmental bodies sharing this concern about the probable impact was Glendale Community College Board of Education.

The first official indication of this concern in Glendale was expressed on February 14, 1978, when a Glendale Community College Board of Education agenda item at its meeting of that date included an informational report prepared by the business administrator of the district. The subject matter was the Property Tax Limitation Initiative. The informational report illustrated, by an admittedly gross estimate, the impact that Proposition 13 could have on Glendale Community College, as well as on the Glendale Unified School District, had the property tax cut been in effect in 1977-78.

Following an oral presentation by the business administrator, the Board members engaged in a public questioning of him and individually and collectively expressed their concern over the possible impact of the "Jarvis" or "Jarvis-Gann" initiative (Howard Jarvis and Paul Gann were the principal authors and vocal proponents of the measure). The business administrator told the Board of Education that he had received an opinion that could render each Board member financially liable if the Board failed to take appropriate action. Glendale College was likened to a private corporation and its Board members analagous to a board of directors. The opinion stated that if a board of directors, knowing that it faced possible financial disaster, failed to take appropriate action to avert it, board members may be individually answerable to the stockholders. Similarly, if a school board, faced with inadequate funds to conduct the school's business for the entire coming academic year,

failed to take appropriate action to keep the college in operation, the individual members might be civilly liable for contracts left unpaid.

At a special Board of Education meeting on March 7, 1978, and after an executive session, the superintendent read a recommendation stating that no later than the beginning of the 1978-79 college year, programs and services of the Glendale Community College District would be reduced or eliminated.

The superintendent reported that due to the reduction of programs and services, it was further recommended that 10 first-year contract employees and 13 second-year contract employees not be reemployed for the 1978-79 school year. The recommendation was approved by a unanimous vote of the board.

This action by the Board of Education set in motion a series of events legally mandated by the California Education Code and California Government Code.

On March 13, a "Notice to the Governing Board of Recommendation Not to Reemploy Permanent Employees" was given to the Board of Trustees of the Glendale Community College District. The superintendent recommended that the employees named on the list not be reemployed for the ensuing school year and that the employees be given notice as required by the California Education Code, Sections 87740 and 87743. In this communication, the superintendent informed the Board of Education that, because they had reduced programs and services, it was necessary to decrease the number of employees of the District. He further notified the Board that there was no probationary (contract) or permanent (regular) certificated employee with less seniority

retained who was rendering service which an employee named on the list was certificated and competent to render.

The superintendent also prepared two other documents that were required by the California Education Code. The first of these was a "Notice of Non-Reemployment of First-Year Contract Employees." This document, also dated March 13, informed the affected employees that, because of a reduction in programs and services for the following school year, they would not be reemployed for the second academic year. The governing statutes are California Education Code Sections 87608 and 87610. There is no right to appeal.

Third, and last, a "Notice of Non-Reemployment of Second-Year Contract Employees" was dated March 13. The notice informed those employees that pursuant to California Education Code Section 87609, a determination had been made not to reemploy them for the 1978-79 academic year. The same reason was given for the action. Unlike first-year contract employees, second-year employees do have a right to appeal under the authority of California Education Code Section 87611. They were so informed and notified that such request(s) for a hearing must be made in writing and received by the superintendent on or before March 20, 1978, and failure to follow those instructions would constitute a waiver of the right to a hearing.

The following day, March 14, the District Personnel office delivered the separation notices to the college. They were hand-delivered to the affected employees by three deans. The deans then returned to the office of one of the members and gave one another reassignment notices, or in the case of one nontenured member, a separation notice.

On the evening of March 14, the Board of Education conducted its regular meeting. Interspersed with routine matters were other actions and communications relative to reductions in staff. The Faculty Senate President gave an oral presentation in which he offered some recommendations in opposition to the Board's decision to send letters of termination. He cited administrators "bumping" faculty, faculty "bumping" one another, the decision to eliminate programs based upon their cost effectiveness, and people asking whether or not the Board was reacting to a hypothetical situation that was less likely to occur than it was to occur. He reported that the Faculty Senate felt that the Board needed to assert aggressively its leadership to educate the community and to declare the scope of an educational program appropriate to Glendale consistent with its ability to support it. Lastly, the Senate President urged the Board to rescind the notices already sent or to declare that the Board would not send the May 15 final notice. Several members of the faculty orally expressed disappointment in the cuts and the priorities attached to different programs.

The last reduction in force action taken at this meeting was a unanimous approval of a recommendation that, not later than the beginning of the 1978-79 school year, programs and support services provided by members of the classified staff would be reduced.

On March 24, the accusation, which is required by the California Government Code, was signed by the superintendent and entitled "Before the Governing Board of the Glendale College District." In this document, the superintendent alleged that he was the superintendent, that the employees on the list were employed on the dates shown, and on March 24 were still employees

of the District. It further alleged that on March 13, 1978, the superintendent gave notice to the Governing Board of Glendale Community College District that the affected employees' services would not be required for the ensuing year because of reduced programs and services. The accusation continued that the employees were given notice as required by law.

On the same date, March 24, the "Notice of Accusation" was given to each employee to be severed from continued service. This notice informed each employee that the accusation was filed with the Board of Education of the Glendale Community College District. The employees were furnished copies of California Government Code Sections 11507.5, 11507.6, 11507.7, and 11506. These sections relate to the employees' right to "discovery" of all documents germane to the defense, set forth the procedures to be followed, and established time-lines that had to be met at each step leading up to the hearing. The employees were notified that they must submit a written request for a hearing within five days of service of the accusation or it would constitute a waiver of the right to a hearing.

Thirty-one tenured staff, including seven administrators, received non-reemployment notices. No administrator filed for a hearing but 23 of the other certificated staff filed "Notices of Defense." Of the 15 second-year contract employees who were served notices, 12 filed defense notices. Ten first-year contract staff were served notices; however, as previously noted, there was no legal right to a hearing under these circumstances.

On March 24, 1978, a "Notice of Hearing" was sent to the affected employees setting the hearing date on April 18-19 and appraising the personnel that they had the right to be present. In addition, this notice informed the employees that they might, but need not be, represented by counsel

who might present any relevant evidence and would be given a full opportunity to cross-examine all witnesses testifying for the Glendale Community College District. Lastly, the notice contained an entitlement to issue subpoenas to compel the attendance of witnesses and the production of documents.

The hearing was held on April 18, April 19, and April 21, 1978. Interestingly, in an administrative hearing of this type, County Counsel represents the interests of the governing board, and private counsel is retained at district expense to represent the superintendent. All of the 35 respondents were represented by attorneys from two employee organizations.

On April 27, 1978, the Administrative Law Judge of the Office of Administrative Hearings, State of California, rendered his proposed decision in the matter. He first reviewed the sequential background beginning March 13, 1978, when the superintendent gave his non-reemployment recommendation to the governing board and ending with the hearing itself. He cited case law that is reviewed in Chapter IV and Section 87743 of the California Education Code. From these two sources he deduced that reductions based on a particular kind of service would properly limit full-time equivalent reductions from 35 to 26.3 positions. (Those who had not requested hearings were not affected.)

He discussed additional problems. Section 87277 of the California Education Code authorizes a holder of a community college instructor credential to teach in his or her minor subject where the governing board specifically authorizes it by resolution. Though the records showed that the Governing Board had in the past given such specific authorizations, the District records

did not contain the employees' academic minors, except for those previously requested by the administrator and authorized by the Board. The judge ruled that the records reflected that at least four junior employees were being retained for teaching in fields in which senior employees notified for non-reemployment possessed credentialed minors. By failing to take into account the minors of the notified employees, an anomalous situation was being created whereby a probationary or permanent employee might be retained in a teaching assignment while a more senior employee was being dismissed, when the senior employee was credentialed and competent to teach the same assignment. The Administrative Law Judge ruled that this was a derogation of Section 87743 of the California Education Code and that such affected employees might be deprived of their constitutional rights. Thus, the four senior faculty members should be retained, according to the hearing officer.

Two athletic coaches challenged their positions on the layoff list. The District chose as their first date of service the date on their original contract. The coaches contended that their coaching duties started about a month earlier and that the dates on which they first received hourly remuneration should have been the effective seniority dates. The Judge sustained this contention and directed that the layoff list be modified accordingly. Within the aforementioned prescriptions he ordered that the non-reemployment of 26.3 full-time equivalents be granted.

In a cover letter to the Board, the Administrative Law Judge reminded the Board that under Section 44949(c) of the California Education Code a copy of the "Proposed Decision" must be submitted to each employee affected on or before May 7. He included a decision form which was to be used if the Board adopted the proposed decision and he requested the Governing Board to send a copy of the decision eventually adopted if it differed.

The Board of Education rejected the proposed decision at its meeting held on May 10. Section 87740 of the California Education Code provides that the final determination as to sufficiency of the cause and disposition is the purview of the governing board and that the proposed decision arising from the administrative hearing is not binding.

The 52 employees scheduled for non-reemployment were given final notices by certified mail on May 12, 1978.

The electorate overwhelmingly approved the passage of Proposition 13 in early June, 1978. At its regular meeting on June 23 the Board of Education took action to again assign five tenured and one nontenured administrators to their former positions. Three former administrators were reassigned as instructors and two were reemployed in their administrative posts for part of the summer only. Five categorically-funded college specialists were rehired on an hourly basis through the end of July, 1978.

Prior to the vote on the initiative, political figures in Sacramento had repeatedly stated that the state would not make up the budgetary "short fall" of local government. This position was then reversed and the State of California came through with the so-called "bail-out" funds from the state surplus. Consequently, on June 30, 1978, all certificated employees slated for non-reemployment were rehired. One administrator's reassignment as an instructor remained unchanged and another administrator was reduced in rank and the contract reduced from 12 to 10 months.

Recent Decision: Hopper vs. Yosemite Community College District

The materials that follow describe a decision that was rendered by the Fifth Appellate District, State of California, in the case of Hopper v Yosemite Community College District, 1981. Hopper was appointed as an Assistant Dean at the Columbia campus of Yosemite Community College District for the 1976-77 academic year. On March 14, 1977, the Board of Trustees, while in executive session, voted not to enter into a second-year contract with Hopper for the forthcoming 1977-78 academic year. Written notice of the Board's decision was served on Hopper the day following the executive session. The decision by the Governing Board and the service of the notice was not preceded by any notice to Hopper or by any type of hearing, nor did the notice notify Hopper of any right to request a hearing or to have a hearing. On May 23, 1977, Hopper served a notice of objection to the Governing Board's action. The District rejected the notice of objection. Hopper brought a cause of action against the District in Superior Court but the trial court held for the District. On appeal to the Fifth District Court of Appeal, the court ruled that Section 87740 of the Education Code required that Hopper be notified of a right to a hearing prior to final termination. The District petitioned for a re-hearing and the Court of Appeal again held for the appellant. The Yosemite Community College District then requested a hearing by the California Supreme Court. The State Supreme Court denied the District's request to hear the case. The District Court of Appeal remanded the case to the Trial Court to determine the District's liability. In the opinion of counsel for the Yosemite Community College District and in the opinion of this investigator, the Appeals

Court ignored the clear legislative intent of Section 87600 through Section 87740 of the Education Code. In 1971, at the time that the legislature established different procedures for the employment, evaluation, and termination of community college staff from that which applies to K-12 certificated employees, leading members of the State Legislature seem to be quite clear in their intent to provide for no right to a hearing for first year "contract" employees. Nevertheless, the Appeals Court held that Section 87740 does mandate such a hearing. The opinion, however, of the court was an unpublished opinion.

The fact that the decision was unpublished is significant because it is of less significance than if it were published. According to Witkin in California Procedure 2d, 1981 supplement, both the State Bar and the Judicial Council requested that citations of such opinions as authority be prohibited. As a result, the State Supreme Court adopted Rule 977, effective January 1, 1974, which states, "an opinion of a Court of Appeal or of an appellate department of a Superior Court that is not published in their official reports shall not be cited by a court or by a party in any other action or proceeding..." (pp. 86-87). At first glance this rule seems clear and unequivocable. However, the waters have been somewhat muddied since that time in Gray v Kay (1975) when a different Court of Appeal than the court that heard the Hopper case ruled that because an unpublished case was not cited, it does not prohibit appellate consideration of the unpublished opinion on its merits where the decision was cited to the trial court, and where it was considered by the parties and the trial court, and when it was made a part of the record on

appeal for the purpose of apprising the reviewing court of the trial court's reason for the decision. In other words, the impact of an unpublished opinion is limited but may be of some import.

Another factor to consider in the Hopper case is the fact that though the Supreme Court denied the District's request that it review the case, the denial does not mean that the Supreme Court either approves of disapproves of the unpublished opinion rendered by the Court of Appeals. It is a well established point of law that the denial of a request to hear a case may mean that the Supreme Court is not ready to hear such a case at that time. It is unclear what impact such a decision has on trial courts within other District Courts of Appeal within the State of California. Courts in other Districts certainly will take cognizance of the decision but are not bound to practice the concept of stare decisis on the basis of this unpublished opinion. Stated in another way; another appellate court within California may take a stance diametrically opposed to the finding of the Fifth Appellate District.

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